No. 86-341

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

FORT HALIFAX PACKING COMPANY, INC.,

Appellant,

—*against*—

MARVIN W. EWING, Director Bureau of Labor Standards, Department of Labor,

Appellee,

—and—

FORT HALIFAX PACKING COMPANY, INC.,

Appellant,

—*against*—

RAYMOND BOURGOIN, et al.,

Appellees.

ON APPEAL FROM THE MAINE SUPREME JUDICIAL COURT

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

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Questions Presented

1. Whether the Maine Severance Pay Law, which requires certain employers either to enter into an express agreement for severance pay with certain employees or, in the absence of such an agreement, to pay the state mandated amount of severance pay, is preempted by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 *et seq.*

2. Whether the Maine Severance Pay Law is preempted by the National Labor Relations Act, 29 U.S.C. §141 *et seq.*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Other Authorities:

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Statement of Interest

The Chamber of Commerce of the United States of America (Chamber) is a federation consisting of approximately 180,000 companies and several thousand state and local chambers of commerce and trade and professional associations. It is the largest association of business and professional organizations in the United States. A significant aspect of the Chamber's activities is the representation of the interests of its member-employers in employment and labor relations matters before the courts, Congress and federal agencies. Accord-

ingly, the Chamber has sought to advance those interests by filing *amicus curiae* briefs in a wide spectrum of labor relations litigation.[1] Consents to the Chamber's *amicus curiae* participation in this appeal have been obtained from Appellant and Appellee and were filed with this Brief on October 16, 1986. The Chamber submits this Brief in support of the Appellant Fort Halifax Packing Company, Inc.'s Jurisdictional Statement.

This case involves the State of Maine's requirement that employers with 100 or more employees in one location during a specified twelve-month period enter into express agreements with certain of their employees to pay severance pay to such employees or pay the state mandated amount of severance pay upon a substantial cessation of the employer's business. The issues are whether Maine's law mandating severance pay (the Maine Severance Pay Law or Severance Pay Law) is preempted by the Employee Retirement Income Security Act of 1974 (ERISA) regulating employee benefit plans and whether the state law impermissibly interferes with the federal labor scheme and protected rights declared in the National Labor Relations Act (NLRA).

These issues are of vital concern to the Chamber's members. Many members have plants in Maine and are directly affected by the Severance Pay Law. Moreover, the potential impact of the Severance Pay Law extends beyond Maine's borders. Under the rationale used by the Maine Supreme Judicial Court in upholding the Severance Pay Law, each state could create its own scheme for what ERISA-covered benefits must be

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[1] *E.g.*, *Wisconsin Department of Labor and Industry* v. *Gould*, 106 S.Ct. 1057 (1986); *Pattern Makers League of North America* v. *NLRB*, 105 S.Ct. 3064 (1985); *Allis Chalmers Corp.* v. *Lueck*, 105 S.Ct. 1904 (1985); *Trans World Airlines* v. *Thurston*, 469 U.S. 111 (1985); *New York Telephone Co.* v. *New York State Department of Labor*, 440 U.S. 519 (1979); *Buffalo Forge Co.* v. *United Steelworkers of America*, 428 U.S. 397 (1976); *Connell Construction Co.* v. *Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616 (1975).

provided by employers. The uniform treatment of ERISA-covered benefits and the adequacy of funding for these benefits, cornerstone of ERISA, would be eroded. The principle of free collective bargaining under the NLRA would also be undermined, since no employer would be free to bargain to provide zero severance pay or to implement after impasse and without express contract a proposal for no or less severance than the state-mandated amount. Additionally, the Maine Supreme Judicial Court's decision upholding the Severance Pay Law is in direct conflict with recent decisions of this Court establishing the boundaries of the preemptive scope of ERISA and the NLRA.

REASONS FOR SUPPORTING PLENARY REVIEW

Summary of Argument

A substantial body of decisions of this Court delineates the boundaries of ERISA and NLRA preemption. This Court has held that ERISA expressly preempts all laws relating to any employee benefit plan. *Alessi* v. *Raybestos Manhattan, Inc.*, 451 U.S. 504 (1981). The preemptive effect of the NLRA is rooted in the Commerce Clause of the United States Constitution. *General Electric Co.* v. *Callahan*, 294 F.2d 60, 66 (1st Cir. 1961), *cert. dismissed*, 369 U.S. 832 (1962). Both ERISA and the NLRA apply to the vast majority of employers in this country.

By enacting ERISA, Congress sought to create uniformity in benefits laws and to prevent inconsistent or conflicting state regulation of employee benefit plans. *See Shaw* v. *Delta Airlines, Inc.*, 463 U.S. 85, 98-99 (1983); *Holland* v. *Burlington Industries*, 772 F.2d 1140, 1147 (4th Cir. 1985), *aff'd mem. sub nom. Brooks* v. *Burlington Industries, Inc.*, 106 S.Ct. 3267 (1986). Similarly, by establishing the framework for collective

bargaining and declaring certain labor-management conduct prohibited or protected or free from regulation under the NLRA. Congress created a federally supervised arena in which employees could peacefully use their economic strength to fashion their working relationship. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959); *Lodge 76, International Association of Machinists* v. *Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976).

In determining whether the express language and well established purposes of ERISA and the NLRA which have contributed to the United States' industrial prosperity and employee security, preempt the Maine Severance Pay Law, consideration must be given to the constitutionally recognized police power of each state to institute legislation to protect the health and welfare of its citizens. *DeCanas* v. *Bica*, 424 U.S. 351 (1976). Measuring, however, the extent of ERISA preemption against the police power interest of Maine in regulating the employee benefits area, it is clear that the Maine Severance Pay Law must be invalidated. The Law impermissibly affects an ERISA-covered benefit, damages ERISA's central purpose of uniformity, and is not the only means by which Maine can address the economic impact of a plant shutdown. Moreover, the Maine Severance Pay Law impermissibly tips the balance of economic power struck by the NLRA between an employer and an employee, and prevents an employer from exercising the NLRA protected right to refuse to agree to any benefit and to institute unilaterally its last best offer after a bargaining impasse is reached.

While such major disruption to federal policy is alone sufficient to warrant preemption, the Maine Severance Pay Law is equally in conflict with this Court's tolerance for minor intrusions by states into federally regulated labor matters. *Metropolitan Life Insurance Co.* v. *Massachusetts*, 105 S.Ct. 2380 (1985). The Maine Severance Pay Law is neither a uniform law nor a minimum standards law and it intrudes directly

and substantially into matters controlled by ERISA and the NLRA. By applying only to employers of 100 or more employees in a single facility the Maine Severance Pay Law discriminates against large multistate employers, particularly those with large facilities. Similarly, the Severance Pay Law also appears to treat unionized and non-unionized companies differently by requiring bargaining only for unionized employees. The Severance Pay Law also vitiates the notion of a minimum standards law by permitting employers and employees to agree to a lower benefit level than the law requires absent an agreement. The State of Maine's reasonable goal of reducing the possible economic hardship to a distinct group of employees or communities cannot be fulfilled in a manner which so directly conflicts with the language and Congressional intent of our nation's most important employment statutes and with the decisions of this Court.

Finally, this Court's recent decision in *Metropolitan Life Insurance Co.* v. *Massachusetts* is being construed by parties such as the Appellee as authority for substantial incursions into employment issues traditionally covered by the NLRA's "free play" of economic forces doctrine. While the Chamber believes *Metropolitan* reaffirmed this Court's commitment to free collective bargaining, unimpeded by statutes which affect the economic power of either party, *Metropolitan's* discussion of the "interstitial" nature of federal labor law suggests the possibility of a much larger role for state statutory action than previously has been recognized. Clearer guidance in the form of an express reaffirmation of the "free play doctrine" will prevent a state statutory assault on collective bargaining and NLRA protected rights, and avoid hundreds of lawsuits by employers, unions and state governments to determine the legality of such statutes.

ARGUMENT

I. The Decision Of The Maine Supreme Judicial Court Should Be Reversed Because It Is In Conflict With The Holdings Of This Court And Several Lower Federal Courts On The Scope Of ERISA And NLRA Preemption.

A. ERISA Preemption.

1. By Requiring An Express Agreement Providing For Severance Pay, The Maine Severance Pay Law Impermissibly Affects ERISA-Covered Plans.

While the Maine Supreme Judicial Court acknowledged this Court's holding in *Shaw* v. *Delta Airlines*, 463 U.S. at 98, that ERISA preempts state actions that have "a connection with or reference to" employee benefit plans (Appendix p. A 7), the State Court concluded that the Maine Severance Pay Law did not have the requisite connection or reference. That conclusion is in direct conflict with this Court's decisions in *Holland* v. *Burlington Industries, Inc.*, 772 F.2d 1140 (4th Cir. 1985), *aff'd mem. sub nom. Brooks* v. *Burlington Industries, Inc.*, 106 S.Ct. 3267 (1986) and *Gilbert* v. *Burlington Industries, Inc.*, 765 F.2d 320 (2d Cir. 1985), *aff'd mem.*, 106 S.Ct. 3267 (1986). In affirming the Fourth and the Second Circuit Courts of Appeals, this Court made clear that severance pay plans or programs need not be created by "express ageements" to be within the scope of ERISA-covered benefit plans.

In both *Holland* and *Gilbert*, the severance pay provision of Burlington Industries was set forth only in its Policy Manual and its Salaried Employee Handbook. The Burlington program provided for disqualification for narrow reasons, the determination of which was left to the company's discretion as long as it did not act arbitrarily or capriciously. Crucially, in each case the Circuit Court recognized that a unilateral statement

of intent to pay severance pay, with no trustee, trust fund or filing with the Department of Labor constitutes an ERISA-covered plan. *Holland*, 772 F.2d at 1144-1145; *Gilbert*, 765 F.2d at 324-326. Indeed, both Circuits made clear that "ERISA governs employer severance pay plans whether funded from general assets, as here, or from a special trust." *Holland* at 1144; *Gilbert* at 325-236.[8] This Court's affirmance of *Holland* and *Gilbert* makes their holdings the law of the land. *Hicks* v. *Miranda*, 422 U.S. 332, 344 (1975).

Gilbert and *Holland* effectuate Congress' intent that ERISA preemption sweep broadly. In expressly rejecting a narrower preemption provision that would have accommodated some state action in the employee benefits area, Congress recognized the concern of multistate employers that employee benefit laws and regulations be uniform. *Shaw*, 463 U.S. at 105. Accordingly, ERISA defines covered employee benefit plans expansively: "[A]ny plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or any employee organization, or by both . . ." 29 U.S.C. 1002(1). Thus, as *Gilbert* and *Holland* hold, ERISA covers informal plans or programs, whether or not they are the "express agreements" required to obviate the operation of the Maine Severance Pay Law.

Since the Maine Severance Pay Law exempts from its requirements only those severance pay arrangements which are created by an express agreement, Burlington's ERISA-covered

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[8] *See also Donovan* v. *Dillingham*, 688 F.2d 1367, 1373 (11th Cir. 1982) (en banc) (holding that a plan exists under ERISA "if from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits"). *Accord Scott* v. *Gulf Oil Corp.*, 754 F.2d 1499, 1503-04 (9th Cir. 1985); *Molyneux* v. *Arthur Guinness & Sons*, 616 F. Supp. 240, 243 (S.D.N.Y. 1985); *Blue Cross & Blue Shield of Alabama* v. *Peacock's Apothecary, Inc.*, 567 F. Supp. 1258, 1267 (N.D. Ala. 1983).

plan would not be recognized by Maine's law. Under the Maine Supreme Judicial Court's decision, Burlington would be required to comply with the Severance Pay Law.

As the Burlington example illustrates, the effect of the Maine Severance Pay Law is to invalidate or supplement a plan which is within the scope of ERISA. In short, no law can have a more direct "reference or connection" with an ERISA-covered benefit plan than the Maine Severance Pay Law. The Maine Supreme Judicial Court's conclusion to the contrary is in direct conflict with this Court's decision. Indeed, at footnote 9 of its opinion the Maine Supreme Judicial Court implicitly acknowledges the conflict, underscoring the need for this Court to state that the Maine Severance Pay Law does relate to ERISA benefit plans and is preempted. (Appendix, p. A 9, n. 9.)

2. The Maine Severance Pay Law Requires Private Employers To Have A Severance Plan In Violation Of ERISA.

As Appellant has pointed out in the Jurisdictional Statement, *Standard Oil Co. of California* v. *Agsalud*, 633 F.2d 760 (9th Cir. 1980), *aff'd mem.*, 454 U.S. 801 (1981), establishes that a state may not mandate creation of a welfare benefit plan. While the Maine Severance Pay Law is different in substance from the Hawaii prepaid health care law at issue in *Agsalud*, it is alike in one crucial respect. Its effect is to force an employer to pay certain ERISA-covered benefits. Under *Agsalud*, the Maine Severance Pay Law must be invalidated. *See also Stone & Webster Engineering Corp* v. *Isley*, 690 F.2d 323 (2d Cir. 1982), *aff'd sub nom. Arcudi* v. *Stone & Webster Engineering*, 463 U.S. 1220 (1983). Moreover, as this Court has observed, ERISA does not mandate that employers provide any particular benefit. *Shaw* v. *Delta Airlines*, 463 U.S. at 91. See also *Sutton* v. *Weirton Steel Div. of National Steel Corp.*, 567 F. Supp. 1184, 1195 (N.D.W.Va. 1983), *aff'd*, 724 F.

2d 406, *cert. denied*, 467 U.S. 1205 (1984). ERISA contains only expressly stated exemptions and exclusions (29 U.S.C. §1144(b)(2)(A) and (b)(4)) from its preemptive reach, and a state's right to require the existence of a benefit plan is not among them. Given ERISA's preemptive sweep and under general rules of statutory construction, a state therefore cannot mandate that employers pay specific benefits, even without the dispositive holding of *Agsalud*.

B. NLRA Preemption.

1. The Maine Severance Pay Law Is Neither A Uniform Law Nor A Minimum Standards Law, But Rather Impermissibly Creates A Bargaining Chip For A Distinct Group Of Employees.

Over several decades there have evolved through this Court's decisions several basic principles governing industrial relations under the NLRA. Included in those principles are the so-called "free play doctrine", *Teamsters Local 20* v. *Morton*, 377 U.S. 252 (1964), the jurisdictional authority of the NLRB, *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), and the right for either labor or management to refuse or to be free from imposition of any particular contract provisions, *H.K. Porter Company, Inc.* v. *NLRB*, 397 U.S. 99 (1970). Certain exceptions, limitations or clarifications to some of those general principles have been recognized by this Court, such as: the authority of the states to regulate unemployment compensation benefits, *New York Telephone Co.* v. *New York State Department of Labor*, 440 U.S. 519 (1979); a state's right to enforce common law tort actions for fraud, *Belknap, Inc.* v. *Hale*, 463 U.S. 491 (1983); and a state's right to regulate the content of insurance policies that are to be sold in that state. *Metropolitan Life Insurance Co.* v. *Massachusetts*, 105 S.Ct. 2380 (1985).

In defining the boundaries of NLRA preemption, this Court has never permitted states to regulate directly the economic

balance of power between employers and employees in the absence of Congressional intent to tolerate such regulation. *See Golden State Transit Corp.* v. *Los Angeles*, 106 S.Ct. 1395, 1401 (1986); *Metropolitan Life Insurance Co.* v. *Massachusetts*, 105 S.Ct. at 2395; *New York Telephone Co.* v. *New York State Department of Labor*, 440 U.S. at 531 and at 554 in Justice Powell's dissent; *Lodge 76, International Association of Machinists* v. *Wisconsin Employment Relations Commission*, 427 U.S. at 141, 149; *Local 24 of the International Brotherhood of Teamsters* v. *Oliver*, 358 U.S. 283, 296 (1959); *Teamsters Local 20* v. *Morton*, 377 U.S. at 260. The Maine Severance Pay Law unquestionably regulates the economic balance. By requiring Maine employers with more than 100 employees in one location during the twelve months prior to a shutdown or substantial cessation of business either to contract expressly for severance pay or to pay the state mandated amount, the Severance Pay Law limits severely the solutions that those employers are free to reach in bargaining over wages and working conditions. Moreover, there is no evidence to suggest that Congress intended to tolerate this type of direct interference. *Cf. Metropolitan Life Insurance Co.* v. *Massachusetts*, 105 S.Ct. 2380.

In *Metropolitan*, a state law requiring inclusion of mental health care benefits in health insurance policies was upheld even though it affected a mandatory subject of bargaining. This Court sustained the Massachusetts law because it: (1) is a minimum labor standards law of the kind which Congress has traditionally recognized as outside the scope of the NLRA; (2) does not discourage or encourage the bargaining process; and (3) is uniform in its application. In contrast, the Maine Severance Pay Law meets none of these criteria.

First, for the reasons set out in Appellant's Jurisdictional Statement, p. 12, the Severance Pay Law is not a minimum labor standards law. Neither is it neutral toward the bargaining process. Under the Severance Pay Law, an employer is not free to refuse to agree to severance pay or to implement unilaterally after impasse a last offer for zero severance or less severance than the state-mandated amount. As a result, a union can use the Severance Pay Law as a bargaining chip to require concessions from an employer in exchange for the union's agreement to less than the state-mandated severance amount. Alternatively, a union can refuse to bargain over severance pay with no pragmatic consequences, since employees will receive severance anyway under the Severance Pay Law. If a state may lawfully create this Hobson's choice for an employer on severance pay, it may do the same with every other benefit, in effect removing from bargaining altogether what under the NLRA are mandatory subjects. The result is to chip away the NLRA's cornerstone of free collective bargaining, with the state rather than the parties striking the balance on mandatory subjects.

Third, the Maine Severance Pay Law is not one of uniform application. By mandating that employers with 100 or more employees in one location must agree on some amount of severance pay, Maine has carved out a small portion of the employer-employee universe. In addition to treating employers differently depending on their size, the Severance Pay Law treats unionized and non-unionized employers differently. By excluding express agreements between employers and employees from its coverage the Severance Pay Law appears to permit a non-unionized employer to declare unilaterally the level of severance pay, creating an express agreement. Yet a unionized employer must accept either its union's demands or pay the state's amount. The Maine Severance Pay Law is thus in direct conflict with the decision in *Metropolitan*, that for any law to permissibly intrude into the bargaining sphere it must apply equally to union and non-union employees and employers.

To the extent that this Court's discussion in *Metropolitan* even arguably opens the door to state regulation of mandatory subjects of bargaining by enactment of uniform minimum standards laws, that discussion should be further clarified. While

the Chamber recognizes the probable impossibility of establishing a rule that eliminates all uncertainty as to what is or is not preempted by the NLRA, this Court should make clear that the establishment by a state of a complete labor code under the minimum standards approach is preempted. Reaffirmation of the "free play doctrine" in the factual context of this case will provide employees, unions and state legislatures with clearer guidance as to what is permissible state action in the collective bargaining arena. Holding the Maine Severance Pay Law preempted will provide both that reaffirmation and consequent guidance.

2. The Maine Severance Pay Law Precludes The Employer's Protected Right To Bargain To Impasse And Institute Its Last Best Offer.

a. The Maine Severance Pay Law Interferes With An Employer's Right To Refuse To Agree To Severance Pay And To Stand On Its Refusal.

The second NLRA preemption principle articulated by this Court is the so-called *Garmon* preemption, which prohibits states from regulating activity that the NLRA protects, prohibits or arguably protects or prohibits. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959).

There are no circumstances under the NLRA which would compel Fort Halifax to pay severance to its employees, in the absence of its voluntary agreement to do so. Under Section 8(d) of the NLRA, both labor and management are protected absolutely from forced agreement on any subject:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees . . . *but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .*

29 U.S.C. 158(d) (emphasis added).

The conflict between the NLRA and the Maine Severance Pay Law is crystalline. Under Section 8(d) of the NLRA, an employer may absolutely refuse to agree to any amount of severance pay. Even the NLRB, with its broad remedial authority, may not compel the employer to agree to pay severance. *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). In contrast, under the Maine Severance Pay Law, refusal to agree to severance is not only unprotected but penalized.[8] As this Court has recently reaffirmed, a state may not create a remedy that Congress has withheld from the National Labor Relations Board. *Wisconsin Dept. of Industry* v. *Gould, Inc.*, 106 S.Ct. at 1061.

b. The Maine Severance Pay Law Interferes With The Employer's Protected Right To Implement Its Last Best Offer.

Under the NLRA, one economic weapon available to the employer is the unilateral implementation of its last best offer in the face of *bona fide* impasse. Unilateral implementation is protected under the NLRA as much as a strike, lock-out or other economic activity. *Reed & Prince Mfg. Co.* v. *NLRB*, 205 F.2d 131 (1st Cir.), *cert. denied*, 346 U.S. 887 (1953).

Applying the use of unilateral implementation to the facts at issue here, an employer whose last bargaining offer is for zero severance pay could, at impasse and in the absence of an express contract, implement a no severance pay policy. The policy would be binding on employees and their representative. Under the proper circumstances (that is, assuming no order by the NLRB to bargain further), it would be the last word on severance pay.

Yet a covered Maine employer who bargains to impasse and implements its last offer of zero or some severance pay without

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[8] In enforcement proceedings under the Maine Severance Pay Law, an employer would be liable for both the statutory amount of severance and attorney's fees and costs. 26 M.R.S.A. §625-B (6-A).

an express agreement will nevertheless be compelled to pay severance according to the statutory formula. The effect of the Severance Pay Law is to deprive the employer of its legitimate and powerful economic weapon of unilateral implementation, even though this weapon is sanctioned and protected by the NLRA and is an integral part of the scheme of federal labor law.

II. The Maine Supreme Judicial Court's Reliance On The Police Power Of The State Does Not Save The Maine Severance Pay Law From Preemption.

The Maine Supreme Judicial Court's reliance on the police power of the state is not controlling on either ERISA or NLRA preemption. In order to avoid ERISA preemption, a state law, in addition to being an exercise of traditional police power, must also affect an ERISA-covered plan "in too tenuous, remote or peripheral a manner to warrant a finding that the law relates to the plan." *Gilbert*, 765 F.2d at 327, quoting *Shaw*, 463 U.S. at 100 n. 21. The Chamber respectfully submits that a statute which invalidates ERISA-covered welfare benefit plans such as Burlington's, requires the creation of an ERISA-covered plan, or is itself such a plan, hardly has a "tenuous, remote or peripheral connection" to an ERISA-covered plan.

The Maine Severance Pay Law also relates to ERISA-covered plans because it gives to the state the power to enforce the statute, thereby ensuring that the State of Maine and its courts will be embroiled in deciding whether or not an informal plan, such as Burlington's, is exempt from the Severance Pay Law as an express agreement and if so, who is covered by the exempt plan.[4] It is impossible to see how that circumstance,

[4]Footnote No. 9 of the Maine Supreme Judicial Court's opinion in this case (Appendix at p. A 9), is an express admission that in some

(Footnote continued on following page)

clearly real and not just speculative, does not "relate to" an ERISA-covered plan.

III. As A Matter Of National Industrial And Employment Relations Policy The Maine Severance Pay Law Should Be Held Preempted By ERISA And The NLRA.

In enacting ERISA Congress chose the path of uniform treatment of employee benefit plans. As stated by Representative Dent, one of ERISA's sponsors, the "crowning achievement" of ERISA was "eliminating the threat of conflicting and inconsistent state and local regulations". 120 Cong. Rec. 29197 (1974). The trade-off for many companies for the subjection to stringent procedural rules and administrative safeguards, as well as the tremendous cost to United States industry for the required funding, was the ability to predict the costs and to plan under one set of rules. Although the Maine Severance Pay Law has the laudable social goal of reducing the economic dislocation to individuals and communities which may result from a major reduction in employment, the Severance Pay Law is in direct conflict with ERISA's purposes of uniformity and self-determination within ERISA's rules. Similarly, contrary to the historical goal of free collective bargaining, the Severance Pay Law changes dramatically the economic strength of the bargaining participants. While the Maine Severance Pay Law is presently the only state law that requires covered employers to pay severance, if allowed to stand the Severance Pay Law will

(Footnote continued from previous page)

cases Maine's courts would be called upon to decide whether a Burlington type plan is or is not an express agreement. Additionally, Maine's courts will on occasion be required by the Severance Pay Law to decide who is an employee entitled to severance pay, a decision which is within the exclusive jurisdiction of the NLRB if the question involves an unfair labor practice or, if the question is one of interpretation of a written collective bargaining agreement, is normally within the determination of an arbitrator, subject to limited judicial review.

be a blueprint for each state, and indeed any other entity such as a county or municipality, to create similar laws.[8]

The variations with which employers might be confronted are endless. From state legislatures alone there could be fifty or more different mandatory severance pay or pension plans. Each state could apply its laws to a different size employer, or even require different benefits based on the size of the company. One state could exempt any employer with an express agreement providing the benefit, as in Maine, while another could exempt any company with a unilaterally adopted plan. Some states might base their benefits coverage on gross sales, other states on gross wages paid by the company. The net effect would be to eliminate a multi-state employer's ability to plan its costs of operations or to base business decisions on the resources and markets available in certain localities. Such intrusions into national labor policy will lead to endless litigation in an effort to redetermine where federal preemption limits a state's authority. The cost of doing business, a burden that American

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[8]While no other similar laws exist, several states have considered plant closing legislation. Three states in addition to Maine currently have plant closing legislation: Massachusetts, 1984 Mass. Pub. L. 608; South Carolina, S.C. Code Ann. § 41-1-40 (Law Co-op. 1986); and Wisconsin, Wis. Stat. Ann. § 109.07 (West Supp. 1985). Maryland has enacted a statute providing for the Governor's Employment and Training Council and the Maryland Department of Employment and Training to jointly develop guidelines for employers in the event of a plant closing or layoff affecting fifty or more employees (Senate Bill 182, Ch. 147 (1985)). Other states which considered some form of plant closing legislation during 1985 include Arizona, California, Connecticut, Hawaii, Illinois, Indiana, Maine, Massachusetts, Missouri, New Jersey, New York, Pennsylvania, Oregon, South Carolina, Vermont, Washington and West Virginia. New bills have been introduced in Indiana (Senate Bill 424) and Kentucky (House Bill No. 340), *Annual Report of the Subcommittee on Plant Closings of the American Bar Association's Labor and Employment Law Section Committee on Individual Rights and Responsibilities in the Workplace*, 2 The Labor Lawyer 3, pp. 356-357 (1986).

industry already frequently finds hard to carry and still compete with foreign corporations, would be greatly increased.

CONCLUSION

In sum, affirmance of the decision of the Maine Supreme Judicial Court would provide the authority and impetus for states to enter the benefits arena whenever an employer has failed to provide the sort of protection which a state legislature believes useful. Such intrusion is contrary to the Congressionally mandated labor policy embodied in ERISA and the NLRA. The issues and policy considerations presented by this case warrant plenary jurisdiction and *amicus* respectfully requests that the Court note probable jurisdiction of this case.

Respectfully submitted,

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